

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CINDY BARBERA, CARLENE
BECHEN, RONALD BIENDSEIL, RON BOONE, VERA
BOONE, ELVIRA BUMPUS, EVANJELINA
CLEEREMAN, SHEILA COCHRAN, LESLIE W.
DAVIS III, BRETT ECKSTEIN, MAXINE HOUGH,
CLARENCE JOHNSON, RICHARD KRESBACH,
RICHARD LANGE, GLADYS MANZANET,
ROCHELLE MOORE, AMY RISSEEUW, JUDY
ROBSON, GLORIA ROGERS, JEANNE SANCHEZ-
BELL, CECELIA SCHLIEPP, TRAVIS THYSSEN,

Plaintiffs,

TAMMY BALDWIN, GWENDOLYNNE MOORE
and RONALD KIND,

Intervenor-Plaintiffs,

v.

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and KEVIN KENNEDY, Director
and General Counsel
for the Wisconsin Government Accountability Board,

Defendants,

F. JAMES SENSENBRENNER, JR., THOMAS E. PETRI,
PAUL D. RYAN, JR., REID J. RIBBLE,
and SEAN P. DUFFY,

Intervenor-Defendants,

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Civil Action
File No. 11-CV-562

Three-judge panel
28 U.S.C. § 2284

**VOCES AND BALDUS PLAINTIFFS' RESPONSE TO MOTION FOR
"CLARIFICATION" RELATED TO TRIAL SUBPOENA OF JAMES R. TROUPIS**

VOCES DE LA FRONTERA, INC., RAMIRO VARA,
OLGA VARA, JOSE PEREZ, and ERICA RAMIREZ,

Plaintiffs,

v.

Case No. 11-CV-1011
JPS-DPW-RMD

Members of the Wisconsin Government Accountability
Board, each only in his official capacity:
MICHAEL BRENNAN, DAVID DEININGER, GERALD
NICHOL, THOMAS CANE, THOMAS BARLAND, and
TIMOTHY VOCKE, and KEVIN KENNEDY, Director
and General Counsel for the Wisconsin Government
Accountability Board,

Defendants.

The memorandum submitted yesterday afternoon by counsel for James Troupis, a subpoenaed witness, begins with a statement that distills the issue here, whether characterized as ethical or evidentiary. Mr. Troupis, the memorandum states without irony, is “not, as a practical matter, involved in this case” Memorandum in Support (Dkt. 182) at 2. To the contrary, he has been at the center of this litigation—and, more importantly, the unprecedented legislative process that preceded it—since the outset. His importance as a fact witness has only just come to light, particularly with respect to the Voting Rights Act claims, but his “involve[ment]” has been ubiquitous, and it began long before Act 43 became law.

The legislature retained Mr. Troupis as counsel when it retained Michael, Best & Friedrich as counsel. If one law firm has forfeited the protection of the attorney-client privilege—and it has—so has its co-counsel. In fact, the entire process that led to this legislation all but eliminated the distinction between political counsel and legal counsel. The emails and other materials, belatedly disclosed by the legislature after four consecutive Court orders, leave

no doubt that Mr. Troupis has been the hub of the strategic and policy decisions that led to the enactment of Acts 43 and 44.

He sought to have a representative of the Mexican American Legal Defense and Education Fund (MALDEF) testify at the legislative hearing on July 13, 2011, in support of Act 43 in order to “take off the table” the largest national funding source for redistricting challenges from the Latino community. He “reported” to the general counsel of a national political party on the developments in the process, sharing that even before the public release of the legislation developed in secrecy at a private law office by invitation only. And he put into place the team of consultants who—working with Mr. Troupis, Mr. McLeod, and legislative aides Tad Ottman and Adam Foltz—crafted the maps that became Act 43.

Mr. Troupis seems eager to distance himself from the remarkable discovery disputes that preceded—and precipitated—his subpoena. That he “has not represented or participated in the defense of any party, third party or the Fitzgeralds [legislative leaders] in connection with this litigation” is immaterial. Mot. for Clarification (Dkt. 179) ¶ 3. While he may not have provided “representation” for the legislature’s serial filings on the question of privilege, he pleads an implausible degree of innocence about what preceded his subpoena: “It appears from the record that *the Defendants, or third parties*, produced certain documents as a result of this Court’s February 16, 2012 Order, Dkt. # 166 (‘February 16 Order’) that ‘reveal[s] information relating to the representation’ Attorney Troupis provided.” Motion for Clarification (Dkt. 179) ¶ 12 (emphasis added).

Those documents were not produced by the defendants or by some unknown “third parties,” however. They were produced by Mr. Troupis’s co-counsel, Eric McLeod, on behalf of their client, the legislature. That much is clear from the opening line of the February 16 Order

that Mr. Troupis cites: the Court establishes that it had “directed that the Wisconsin Legislature (the Legislature) file sealed copies of eighty four documents” over which it was claiming privilege. Feb. 16 Order (Dkt. 166) at 2. No matter the precise definition of Mr. Troupis’s role, it is difficult to feign ignorance as to the documents’ source.

The best evidence, to date, of Mr. Troupis’s involvement appears in those very documents, unsealed by this Court because they involve political and strategic (but not legal) advice, as well as in the additional production of materials by Mr. McLeod on February 17, 2012. The stream of e-mails places Mr. Troupis at the center of efforts to have Act 43 endorsed by MALDEF, in Chicago, giving the legislation an imprimatur of legitimacy from a respected Latino rights group—albeit one with no knowledge of the Latino districts in Milwaukee beyond what Mr. Troupis chose to tell them. They also reveal evidence of an intent to divide geographically and segregate politically Milwaukee’s Latino population within the area allocated to Assembly Districts 8 and 9, the outer boundaries of which were treated as immutable to avoid disruptions to any of the surrounding districts.

In this way the discovery saga comes full circle. In its motions to quash from December, the legislature argued that how it “arrived at the final product is legally immaterial.” Mot. to Quash Handrick Subpoena (Dkt. 63) at 3; Mot. to Quash Ottman Subpoena (Dkt. 72) at 2. Plaintiffs replied—and this Court held—that intent *does* matter to the Voting Rights Act claim. Pls.’ Opp’n to Mot. to Quash (Dkt. 71) at 3; Order Denying Mot. to Quash (Dkt. 74) at 3. That contention—that the process by which Act 43 was created is irrelevant—is one that the defendants continue to press. *See* Defs.’ Motion in Limine (Dkt. 160) at 4. The documents unsealed on February 16—plus the attachments and additional e-mails produced the following

day—are directly relevant to the “totality of the circumstances” analysis. *How* relevant depends on what Mr. Troupis has to say.

Mr. Troupis’s participation was not limited to the MALDEF question. The documents reveal him to be an architect of the Republican leadership’s political strategy, directly involved since the leadership began fashioning and executing an approach to redistricting never seen before in this state. The ordinarily fine line between that and legal strategy was, in this case, “so thinly drawn purely as a result of the Legislature’s own doing.” Feb. 16 Order (Dkt. 166) at 3. In the documents unsealed on February 16 alone, Mr. Troupis sent, received, or is copied on 75 of the 84 communications.

Plaintiffs—and the *Voces* plaintiffs are joined by the *Baldus* plaintiffs in this response—are mindful that there may be “some areas about which Mr. Troupis will not have to testify because the attorney-client privilege is appropriate.” Feb. 21 Transcript at 41:7-9. However, none of the proposed areas of inquiry fall into that category. Plaintiffs seek only to ask Mr. Troupis “about his communications *with the individuals identified* in the documents ordered released by the Court *regarding the subject matter contained* in said documents.” Proposed Stip. (Dkt. 179-2) at 1 (emphasis added). In other words, the inquiry is limited to communications with people—and about subjects—over which the Court has already found *there is no privilege*. It never existed or, through the conduct of the legislature and counsel, it has been waived.

Mr. Troupis disputes this, arguing that the attorney-client privilege precludes him from testifying about topics that the Court has already identified as political advice. Plaintiffs need not litigate this question a fifth time. There is no privilege, and the testimony solicited will be limited to this unprivileged universe.

Plaintiffs are prepared to take Mr. Troupis's deposition today, if necessary. However, Mr. Troupis's professed inability to even identify the party that produced the unsealed documents—and the prominence of his own name in those documents—begs the question as to whether or not he has fulfilled his production obligations in response to plaintiffs' subpoenas. Mr. McLeod himself acknowledged, in a February 17, 2012 e-mail, that the legislature had failed previously to produce "additional responsive email communications between counsel and Mr. Ottman and/or Mr. Foltz that were not in the actual possession of Mr. Ottman and/or Mr. Foltz, but which were in the possession of counsel." The documents he produced, however, were Mr. McLeod's alone. Mr. Troupis, as advisor to the legislature, is as likely as Mr. McLeod to have additional responsive documents in his possession, given that the only documents the plaintiffs have seen from Mr. Troupis's files were produced before this Court's February 16 order. And plaintiffs have yet to see those documents.

The Court has already proposed continuing the trial until the week of March 12 or 19 to allow room for settlement—a possibility that legislators on both sides of the aisle now have endorsed. And this Court has separately requested briefs on whether the legislature can revisit its own redistricting statutes, in light of what the Government Accountability Board—or at least its counsel—characterizes as contrary precedent. To this the plaintiffs add another reason for continuing trial to March: to allow the deposition of Mr. Troupis, following a complete document production.

Dated: February 22, 2012.

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